Supreme Court U.S.
FILED
APR 4 2002
OFFICE OF THE CLERK

(2)

No. 01-1271

IN THE

Supreme Court of the United States

KNIGHTS OF COLUMBUS, COUNCIL #94, LEXINGTON, MASSACHUSETTS, *et al.*,

Petitioners,

v.

TOWN OF LEXINGTON, *et al.*,

Respondents.

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

SCOTT P. LEWIS
Counsel of Record
DARYL J. LAPP
JORDANA B. GLASGOW
PALMER & DODGE LLP
Attorneys for Respondents
111 Huntington Avenue
at Prudential Center
Boston, MA 02199
(617) 239-0100

173301

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

2508

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the petitioners' First Amendment rights of freedom of speech and religious expression were violated by the denial of a permit to display an unattended nativity scene for five weeks on the Lexington (Massachusetts) Battle Green when the display would violate a regulation prohibiting all "unattended structures" on the Green; the regulation applies to all unattended structures, without regard to the content or message of any speech conveyed by the structure; the regulation was enacted solely to advance the legitimate government interests of protecting the historic and aesthetic qualities of the Green and to guard against the secondary effects of unattended structures; and the regulation not only permits the display of the nativity scene on the Green for more limited periods of time but also leaves open ample alternative means for the petitioners to communicate their message in the Town of Lexington, both on and off the Green.

TABLE OF CONTENTS

	Page
Counter-Statement of the Question Presented	i
Table of Contents	ii
Table of Cited Authorities	iii
Opinions Below	1
Counter-Statement of the Case	1
1. Relevant Facts	1
2. Procedural Background	8
Reasons for Denying the Writ	10
I. The Rules Are a Classic Content-Neutral Time, Place and Manner Restriction	11
II. The Amendments Do Not Constitute A "Heckler's Veto"	15
III. The Amendments Are Narrowly Tailored to Serve Significant Government Interests ...	17
Conclusion	20

TABLE OF CITED AUTHORITIES

Page

Cases:

American Jewish Congress v. *City of Beverly Hills*, 90 F.3d 379 (CA9 1996) 12

Capitol Sq. Review & Advisory Bd. v. *Pinette*, 515 U.S. 753 (1995) 12

City Council of Los Angeles v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) 18

Clark v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) 17

D.H.L. Associates v. *O'Gorman*, 199 F.3d 50 (CA1 1999) 12-13, 19

Frisby v. *Schultz*, 487 U.S. 474 (1988) 17

Globe Newspaper Co. v. *Beacon Hill Architectural Comm'n*, 100 F.3d 175 (CA1 1996) 18

Hill v. Colorado, 530 U.S. 703 (2000) 11, 13, 16, 17

Lubavitch Chabad House, Inc. v. *Chicago*, 917 F.2d 341 (CA7 1990) 12

McGuire v. *Reilly*, 260 F.3d 36 (CA1 2001) 15, 17

Members of City Council v. *Taxpayers for Vincent*, 466 U.S. 789 (1984) 18

Cited Authorities

Page

Messer v. *City of Douglasville*, 975 F.2d 1505, 1510 (CA11 1992), *cert. denied*, 508 U.S. 930 (1993) 18

National Amusements v. *Town of Dedham*, 43 F.3d 731 (CA1 1995) 19

Plain Dealer Pub. Co. v. *City of Lakewood*, 794 F.2d 1139 (CA6 1986) 20

Renton v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986) 12

United States v. *Albertini*, 472 U.S. 675 (1985) ... 18

Ward v. *Rock against Racism*, 491 U.S. 781 (1989) 11, 18, 19

Wells v. *City and County of Denver*, 257 F.3d 1132 (CA10 2001), *cert. denied*, 1225 S. Ct. 469 (2001) 12

United States Constitution:

First Amendment i

Statutes:

16 U.S.C. §§ 470, *et seq.* 1

General By-laws of the Town of Lexington, Article XXV, § 25 2

Mass. Gen. L. c. 9, §§ 26-27C 2

OPINIONS BELOW

In addition to the opinions cited by the petitioners, the Court of Appeals denied the petitioners' request for emergency injunctive relief and expedited appeal. *Knights of Columbus* v. *Town of Lexington*, No. 00-2539 (CA1 Dec. 20, 2000) (order denying injunction pending appeal and request for expedited appeal).

COUNTER-STATEMENT OF THE CASE

Petitioners Knights of Columbus and Grand Knight Michael O'Sullivan (together, the "Knights") applied for a permit to display a nativity scene, or crèche, on the Lexington (Massachusetts) Battle Green for a five-week period during the 2000-2001 Christmas season. Respondents the Lexington Board of Selectmen (together with the Town of Lexington, the "Board") denied the permit because the display would constitute an "unattended structure" in violation of the Rules and Specifications Regulating the Use of the Battle Green (the "Rules").

1. Relevant Facts.

a. The Battle Green.

The first battle of the Revolutionary War occurred on April 19, 1775, at the green on Lexington Common, now known as the Lexington Battle Green. Seven of the eight Minutemen killed during the battle are buried there. The famous Minuteman Statue is the focal point of the Green, commemorating the heroic efforts of American colonists who fought in the Revolutionary War. The Green is a National Historic Landmark and is listed in the National Register of Historic Places, pursuant to the National Historic Preservation Act of 1966, 16 U.S.C. §§ 470, *et seq*. The Green

also is listed in the Massachusetts State Register of Historic Places and designated as a Local Historic District, pursuant to Mass. Gen. L. c. 9, §§ 26-27C. R. 74.[1]

b. The Traditional Uses of the Green and the Board's Role in Regulating Them.

In addition to its importance as an historic site and place of interest for tourists and local residents, the Green traditionally has been used for the active expression of political, religious and other views. Such speech on the Green has included protests, rallies, demonstrations, reenactments, prayer vigils and church services. R. 83-84. Perhaps the best known use of the Green is the annual re-enactment of the Battle of Lexington, which takes place every April. In the recent past, the Green has been used for Easter Sunrise Services, weddings, a prayer rally for the National Day of Prayer, a demonstration against commercial flights at a local air force base, a rally in support of a labor strike and for a variety of other purposes. R. 75.

The Board is charged with the protection of the Green under the General By-laws of the Town of Lexington, Article XXV, § 25. The By-laws require the Board to promulgate "regulations that define both the standards and procedures by which [the Board] will grant or deny permits" for the use of the Green. R. 74, 91. Pursuant to this authority, the Board enacted the Rules, allowing certain casual uses of the Green without a permit, but requiring permits for special events and other group activities. The Rules state that permits are required in order

> to promote the use of the Battle Green in a manner consistent with its nature and history; to protect

---

1. References to the Record Appendix filed in the Court of Appeals will appear in the form of "R. __."

> the Battle Green from harm; to ensure adequate notice of the event so that arrangements can be made to protect the public health and safety and to minimize interference with the event by the public.

R. 74-75, 94.

c. The Crèche's Longstanding Favored Treatment by the Town.

For most of the past 80 years, a crèche has been erected on the Green each Christmas season, immediately behind the Minuteman statue. For many years after World War II, the Town was responsible for maintaining, erecting and storing the crèche, and effectively was the owner of it. In the early 1970s, after Lexington citizens and clergy raised concerns about the appropriateness of the Town's role in sponsoring the crèche, the Board transferred ownership, possession and maintenance of the crèche to two fraternal orders in the town, the Knights and the Simon W. Robinson Lodge, Ancient Free and Accepted Masons (the "Masons"). R. 75-76.

However, the crèche still continued to enjoy preferred treatment by the Town. At the same time that the Board transferred ownership of the crèche, it also granted the new owners what amounted to a special license to erect the crèche on the Green every Christmas season. Although the Board's Rules, beginning in the early 1980s, required a permit for displays of this nature, the Town continued to afford the crèche special treatment by allowing it to be erected each year without a permit.[2] R. 76, 99.

---

2. Prior to 1982, the By-laws required applicants to receive written permission from the Board. The Knights and Masons never sought or received such permission. R. 76.

d. The 1999 Permit for the Crèche.

While the crèche long had been a source of controversy in the Town, by the late 1990s its annual presence on the Green had become increasingly divisive. Many people in the Town viewed the special status given to the crèche, and its prominent and extended placement on the Green, as an endorsement of Christianity by the Town. In response to this concern, the leaders of several local churches and other interested citizens worked to arrive at a consensus about whether the crèche should continue to be displayed on the Green. That effort, however, was unsuccessful. R. 76-78.

In 1999, the Board attempted to end the special treatment afforded the crèche by requiring the issuance of a permit. The Board voted on October 18, 1999, to issue a three-week permit for the crèche, even though Board members were concerned that allowing the crèche to be placed on the Green might be viewed as a public endorsement of religion, and that the placement of such a structure for an extended period of time, unaccompanied by any actual event, was not an appropriate use of the Green in view of its traditional use as a forum for active expression. R. 78-79, 197.

e. Proposals for Other Structures on the Green.

Later in the fall of 1999, the Board received four permit applications from groups or individuals seeking to erect structures on the Green. These subsequent applications were motivated at least in part by a desire to protest or counter the crèche display. R. 79-82, 198.

(1) Sign Protesting the Crèche.

Shortly after the Board voted on October 18, 1999, to issue the three-week permit for the crèche, the Board received a permit application for the display of a 4-foot by 8-foot sign

protesting the extended placement of the crèche on the Green. Although the Board recognized that such a sign would be extremely controversial and divisive, the Board understood that it could not decide whether to grant the permit based on the content of the sign. The Board denied the permit application because the sign was prohibited by the Town's zoning by-laws. R. 79-80.

(2) Witchcraft and Sun God Structures.

The Board also received a single permit application for two separate structures to be displayed on the Green, one for the month of April 2000 and one for the month of October 2000. For April 2000, the application requested a permit for a four-week display of a pyramid in honor of the ancient Egyptian Sun God, Ra. For October 2000, the application requested a permit for a four-week Halloween display containing the figures of a witch, a skeleton and a ghost in celebration of Witchcraft, which the applicants described as a "religion recognized in Massachusetts since the Salem Trials." The Board requested more information about the design, size and appearance of these structures at its November 22, 1999, meeting. Because the applicants never provided the additional information requested, the Board never voted on these permit applications. R. 80-81.

(3) A Sukkah.

In November 1999, a Lexington resident submitted an application for a permit to place a sukkah on the Green in honor of the Jewish holiday of Sukkoth, which is a harvest celebration and a remembrance of the wanderings of the ancient Israelites. The application indicated that the sukkah, an open hut-like structure, would be 8 feet wide, 14 feet long and 8 feet high, and would be placed in a prominent location on the Green between the Minuteman Statue and the flagpole

for 12 days the following October. The Board did not act on this application, and the applicant has not pursued it, because both understand that the application is inconsistent with the amendments prohibiting the placement of unattended structures on the Green. R. 81-82, 145.

(4) Other Potential Permit Applications.

In addition to these formal permit applications, Board members also were made aware of potential permit requests that were contemplated for: (1) a commemoration of Mayan or Aztec religious festivals; (2) a commemoration of the religious practices of the Crusaders; (3) a statue of the comedian Flip Wilson in honor of the "Church of What's Happening Now"; and (4) the placement of a herd of live cows on the Green in honor of the Hindu religion. R. 82, 147-48.

The Board understood that some or all of these potential applications were not serious, and that the prospective applicants had no desire actually to erect such structures on the Green. However, the Board also realized that if it granted a permit for the crèche, it also would be required to permit these other displays on the Green. The Board understood that it was required to treat all viewpoints in exactly the same manner, including expressions of protest against religious, political or commercial speech. R. 82.

f. The Challenged Amendments.

The foregoing permit applications, both actual and potential, underscored the Board's existing belief that the placement of a structure on the Green for an extended period of time, in the absence of an accompanying event, is not an appropriate use of the Green and is not consistent with the historic nature of the Green. While this concern was

articulated in the context of discussions about the crèche and the applications for other structures, the Board did not oppose the substance or content of the structures that would be displayed on the Green. It was instead the length of time and manner in which they would be displayed that was problematic. The Board did not want the Green to become a display area for structures, be they religious, political, commercial or otherwise. R. 83, 198.

Therefore, on July 24, 2000, the Board voted to amend the Rules in two pertinent respects. First, the amended Rules limit the duration of events held on the Green. Specifically, the Board must issue a permit for "[s]pecial events,[3] public meetings, assemblies, gatherings, demonstrations, parades, and other active public expressions of interest [on the Battle Green], not to exceed eight hours in duration" and for "[d]isplays of a ceremonial nature in connection with special events and limited in duration to the period required for such events." Second, the Rules now prohibit "[p]lacement on the Battle Green of any unattended structure" by private parties.[4] R. 94-95.

---

3. A "special event" is defined as "demonstrating, picketing, speechmaking, marching, holding of vigils, and all other similar forms of conduct which involve the active communication or expression of opinions or grievances, engaged in by one or more persons, the conduct of which has the effect, intent, or propensity to draw a crowd or onlookers." R. 93.

4. While the language of the amendment that the Board approved prohibits the "placement on the Battle Green of any unattended structure by any private party," R. 157, the Rules as published mistakenly omit the words "by any private party." R. 95.

g. The Knights' Permit Application and the Board's Alternative Suggestion.

On October 19, 2000, the Knights submitted a permit application to erect and display a crèche on the Green from December 3, 2000 to January 6, 2001. Displaying the crèche continuously over the course of five weeks would violate the prohibition against the placement of any unattended structure on the Green by a private party. Accordingly, at the October 30, 2000 meeting of the Board, the Board constructively denied the permit application. R. 86-87.

The Board, however, suggested an alternative. At the same meeting, Selectman Peter Enrich invited the Knights to amend their application to conform to the Rules. Specifically, he indicated that the Board would approve a permit application for an eight-hour event that included a display of the crèche because that would be consistent with the Rules. The Knights declined to amend their permit application. R. 87, 193-95. The Knights also rejected an invitation from a nearby church to display the crèche on its property directly across from and in public view of the Green. R. 201.[5]

2. Procedural Background.

The Knights filed suit in the United States District Court for the District of Massachusetts in November 2000, alleging that the Board's amendments prohibiting unattended structures on the Green were enacted for the sole purpose of inhibiting the Knights' exercise of religious expression. The Knights moved for preliminary injunctive relief to

---

5. The Board also has granted a permit to conduct a series of rallies protesting the exclusion of the crèche from the Green, as well as for a "live" nativity (a recreation with role-players in costume) and accompanying religious service. R. 86, 207.

require the Board to allow the display of the crèche. On December 6, 2000, the District Court issued an Order and Memorandum denying the Knights' motion for preliminary injunction. R. 268. The District Court found that the Knights were not likely to succeed on the merits because the amendments constituted a content-neutral time, place and manner restriction narrowly tailored to serve a substantial government interest and allowed for reasonable alternative avenues of communication. R. 269.[6]

Following discovery, the parties filed cross-motions for summary judgment in the District Court. On October 10, 2001, the District Court issued an Order of Dismissal denying the Knights' motion for summary judgment and granting the Board's motion for summary judgment. The District Court held that the amendments constituted a content-neutral time, place and manner restriction, narrowly tailored to serve a substantial government interest. R. 36-42. Specifically, the court found that the "record does not support [the Knights'] claim that the Regulations were enacted due to hostility toward the message of the crèche." R. 32. The District Court also held that the amendments did not violate the Knights' rights to free exercise of religion. R. 44.

The Knights appealed to the First Circuit Court of Appeals, and the appeal was briefed and heard on an expedited basis in advance of the 2001-2002 Christmas season. On November 29, 2001, the First Circuit issued a

---

6. On December 11, 2000, the Knights filed an emergency motion for a preliminary injunction pending appeal and a motion for expedited appeal in the United States Court of Appeals for the First Circuit. A week later, the Court of Appeals, "[a]fter careful review of the record and the parties' submissions," denied the Knights' request for an injunction "essentially for the reasons set out by the district court," and also denied the motion for expedited appeal. *Knights of Columbus* v. *Town of Lexington*, No. 00-2539 (CA1 Dec. 20, 2000).

decision affirming the District Court's decision. The Court held that "the record shows beyond hope of contradiction that the ban on unattended structures is a content-neutral restriction on the time, place, and manner of speech, narrowly tailored to achieve a significant governmental interest and framed so as to allow access to ample alternative avenues of communication." *Knights of Columbus* v. *Town of Lexington*, 272 F.3d 25, 28 (CA1 2001).

REASONS FOR DENYING THE WRIT

The question presented by the Knights' petition raises no new issue for this Court. The prohibition against unattended structures at issue here presents a garden-variety time, place and manner restriction. Indeed, this Court already has recognized such a prohibition against unattended structures to be an inherently neutral time, place and manner restriction.

In this case, both the District Court and the Court of Appeals — each on two separate occasions — thoroughly examined the amendments and the record of their enactment and found no evidence whatsoever that the amendments were content-based. There is no reason for this Court to undertake a review of the record yet again, as the Knights urge in their petition. The Board's decision to amend the Rules stemmed from legitimate concerns about the historic and aesthetic qualities of the Green, not from any disagreement with the message of the crèche or from a desire to appease citizens protesting the crèche. The amendments to the Rules are narrowly tailored to serve significant government interests and allow the Knights ample alternative means to communicate their message.

I. The Rules Are a Classic Content-Neutral Time, Place and Manner Restriction.

"The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Hill* v. *Colorado*, 530 U.S. 703, 719 (2000) (quoting *Ward* v. *Rock against Racism*, 491 U.S. 781, 791 (1989)). As this Court recently made clear in *Hill*, the test for content-neutrality can be satisfied in several different ways. First, a regulation can be upheld as content-neutral if it is not a "regulation of speech" but rather is a "regulation of the places where some speech may occur." 530 U.S. at 719. Second, a regulation can be upheld if it applies to all speech, regardless of viewpoint, and makes no reference to the content of the speech. *Id.* Third, a regulation is "'content neutral' if it is justified without reference to the content of regulated speech." *Id.* at 720.

As both the District Court and Court of Appeals repeatedly found, the amendments at issue here meet these and any other variations of the test for content-neutrality.

The amendments are not "a regulation of speech," but rather a "regulation of the places where some speech may occur." *Id.* at 719. The amendments do not prohibit the Knights' speech — or Christian speech more generally, or religious speech more generally still — either on the Green or elsewhere in the Town of Lexington. Rather, the amendments regulate only one particular public place where speech may occur — the uniquely historic Battle Green. Moreover, the amendments regulate the use of the Green *not* on the basis of the content of any speech, but solely on the basis of the time and manner of such expression. Specifically, the amendments limit events to eight hours in duration, and

allow the use of structures only in connection with such permitted events. R. 83-84, 198-99. The amendments apply to all speech, regardless of viewpoint, and make no reference to the content of the regulated speech.

Indeed, as a majority of this Court and various courts of appeals already have recognized, a content-neutral ban on all unattended structures is an inherently reasonable time, place or manner restriction. *See Capitol Sq. Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 761 (1995) ("a ban on all unattended displays . . . might be one such" reasonable time, place, or manner restriction); *id.* at 783 (Souter, J., concurring) ("I also want to note specifically my agreement with the Court's suggestion that the State of Ohio could ban all unattended private displays in Capitol Square if it so desired"); *id.* at 803 (Stevens, J., dissenting) ("the Court correctly recognizes that a State may impose a ban on all private unattended displays in such a forum"). *See also Wells* v. *City and County of Denver*, 257 F.3d 1132, 1149 (CA10 2001), *cert. denied*, 1225 S. Ct. 469 (2001) (city's ban on private unattended displays upheld as a content-neutral time, place or manner restriction); *American Jewish Congress* v. *City of Beverly Hills*, 90 F.3d 379, 384 (CA9 1996) ("the City constitutionally could ban all unattended private displays in its parks"); *Lubavitch Chabad House, Inc.* v. *Chicago*, 917 F.2d 341, 347 (CA7 1990) (there is no "private constitutional right to erect a structure on public property" because "[i]f there were, our traditional public forums, such as our public parks, would be cluttered with all manner of structures").

Finally, the amendments have the purpose of controlling the secondary effects resulting from the protected expression, rather than inhibiting the protected expression itself. *See Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986). *See also D.H.L. Associates* v. *O'Gorman*, 199 F.3d 50, 57

(CA1 1999). In other words, the amendments are content-neutral because they are "justified without reference to the content of the regulated speech," *Hill*, 530 U.S. at 720, the "regulated speech" here being any speech involving the use of unattended structures. The Board enacted the amendments in July 2000 to protect the historic and aesthetic qualities of the Green, and to guard against the secondary effects of unattended structures, only *after* it had received permit requests for a variety of other structures. R. 79-82, 84-85, 198. The Board enacted the amendments not for the purpose of banishing the crèche, but only after it became clear that continuing to allow the crèche, or any other religious display, would result in a barrage of competing structures that not only would be inconsistent with the historic function of the Green as a forum for active expression, but also would significantly impair the Green's important historic and aesthetic qualities. R. 83-84.

The Board's concern about clutter on the Green and its intent to amend the Rules to apply equally to all unattended structures was evident at the time the decision to amend the Rules was made. As Board member Peter Enrich stated at the July 24, 2000, meeting:

> To my mind, nothing could be less appropriate than for us to review individual organizations' proposals for individual structures expressing particular points of view on a case-by-case basis. . . . I think we need to do something that is uniform, that is neutral with respect to viewpoint and that treats all groups exactly alike. I think that's tremendously important.
>
> * * *
>
> I think what we're trying to do is to articulate [the] neutral grounds that will guide our future

> decisions . . . [W]hat we're saying is: Anything of this sort, whether it be a crèche; a menorah; a pyramid to the sun god, Rah [sic]; a political sign for a candidate; an advocacy of atheism, that any of those will be forbidden uniformly and without any attention to the viewpoint . . . of the presenter.

R. 168-69. *See also* R. 198, 206 (Selectman Jeanne Krieger at the July 10, 2000 Board meeting: "I think that a step that would allow us to restrict activities on the common to those that are associated with actual events with people on the Green expressing their opinions is the appropriate use of the common and . . . I think that's appropriate from the historical context as well.").

In approving the ban on unattended structures, the Board thus did not target the Knights, the crèche itself, or any particular viewpoint. Nor did the Board discriminate on the basis of the content of any protected speech. Rather, the Board's interests in preserving the historic and aesthetic qualities of the Green prompted the passage of content-neutral regulations generally applicable to all speakers and all points of view.

There is no reason for this Court to parse the record yet again to look for content-based motives that do not exist. The record here does not remotely support the Knights' allegations that the amendments were enacted for the purpose, or with the inevitable effect, of singling out and stifling any particular speech, whether symbolized by the crèche or otherwise.

With respect to religious speech generally, the Knights themselves claim that the Green regularly is used for all manner of religious exercises. R. 232-33. None of these religious activities would be prohibited by the amended Rules.

With respect to the Knights' particular religious expression, the undisputed evidence also refutes any notion that the Board's actions have been content-based. The Board allowed the Knights' 1999 petition, prior to the enactment of the unattended structure rule. R. 78. The Board granted a permit for demonstrations protesting the absence of the crèche on the Green. The Board also invited the Knights to seek an eight-hour permit for an event with the crèche, and has suggested that the Knights apply for a permit to display the crèche during three separate eight-hour events in successive weeks during the Christmas season.[7] R. 86-88.

No Board motivated to stifle the Knights' expression would have unilaterally offered such suggestions for ways in which that expression could be accommodated. On that record, there is no principled basis for concluding that the enactment or enforcement of the amendments was content-based. *See McGuire* v. *Reilly*, 260 F.3d 36, 44 (CA1 2001) (fact that facially neutral regulation results in restriction of speech of a particular group does not mean that the restriction "results from a fundamental disagreement with the *content* of their expression," particularly where the government has made "every effort to restrict as little speech as possible while combating the deleterious secondary effects" of the restricted speech) (emphasis added). This Court could only reach the same inescapable conclusion.

II. The Amendments Do Not Constitute A "Heckler's Veto."

The Knights' claims against the Board have morphed over time but at each turn have been soundly rejected by the courts below. At the outset of this litigation, the Knights failed to persuade the District Court that the Board had sought to

7. The Board also granted a permit to the Knights' supporters for the performance of a "live" nativity and service on December 23, 2000. R. 207.

silence the message of the crèche. In the First Circuit, the Knights shifted the focus of their claims to argue, in addition to their original claims, that the Board had applied the Rules inconsistently. They again failed. In the latest incarnation of their claims, the Knights argue in this Court that the Board's amendments amounted to a "heckler's veto." This Court need not entertain yet another spin on a claim that is baseless at its core.

There is no evidence to support the Knights' claim that the amendments were passed by the Board to capitulate to threats of disruption. The Board amended the Rules with the understanding that times had changed and the crèche no longer would be the only structure on the Green. It was of no significance to the Board whether the other structures constituted political speech or satire, such as the pyramid to the Sun God Ra, or more "serious" religious speech, such as the Sukkah. In either case, the Board understood that it would have to allow all such structures to be erected. It could not, as the Knights suggest, "treat each request separately." Petition p. 16. It was the Board's legitimate concern about the secondary effects of clutter on the Green that motivated the amendments, not fear of listeners' reactions.[8]

The gist of the Knights' claim is that because the Rules were amended in response to the controversy surrounding the proposed erection of the crèche, they are inherently

---

8. In any event, while the government cannot suppress speech solely on the basis that it is offensive to some, such offensiveness can be an appropriate factor when weighed along with other legitimate government interests. This Court has "repeatedly recognized the interests of unwilling listeners in situations where 'the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure.'" *Hill*, 530 U.S. at 718. This Court's "cases do not support [the] view" that it is "unconstitutional" to "recogniz[e] any of the interests of unwilling listeners — let alone [to balance] those interests against the rights of speakers. . . ." *Id.* (citations omitted).

content-based. But this case is no different than any other in which new legislation is prompted by debate about a particular issue. This Court long has recognized that it is unrealistic to expect that time, place and manner restrictions will be enacted in a vacuum. Indeed, the enactment of time, place and manner restrictions inevitably will be the result of some particular speech, and that fact alone does not make the regulation void or even inherently suspicious. *See Hill*, 530 U.S. at 724 ("[T]he contention that a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate is without support."); *Frisby* v. *Schultz*, 487 U.S. 474, 488 (1988) (upholding constitutionality of ordinance prohibiting picketing of individual dwelling where ordinance was passed specifically in response to picketing of homes by abortion protesters). *See also McGuire*, 260 F.3d at 45 (where the government engages in a "content-neutral effort to combat secondary effects" of a particular form of speech, the fact that a regulation may have been adopted in direct response to the negative impact of that speech does not render the regulation content-based). As the District Court in this case stated, "[t]he First Amendment does not prevent public debate from leading to legislation — in fact, such a result would be completely antithetical to the aims of the First Amendment." R. 36.

III. The Amendments Are Narrowly Tailored to Serve Significant Government Interests and Allow Alternative Avenues of Communication.

It is well established that preserving the historic and aesthetic qualities of a public forum constitutes a significant government interest for purposes of analyzing the reasonableness of a time, place or manner restriction. *See, e.g., Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984) (upholding a ban on camping in Lafayette Park because the state has a significant government interest in maintaining national parks in an attractive and intact condition and making the parks

available to tourists); *City Council of Los Angeles* v. *Taxpayers for Vincent*, 466 U.S. 789, 805 (1984) ("It is well settled that the state may legitimately exercise its police powers to advance esthetic values."); *Globe Newspaper Co.* v. *Beacon Hill Architectural Comm'n*, 100 F.3d 175, 187 (CA1 1996) (recognizing aesthetics as a significant government interest justifying a ban on newspaper distribution boxes from the public streets of the Beacon Hill historic district); *Messer* v. *City of Douglasville*, 975 F.2d 1505, 1510 (CA11 1992), *cert. denied*, 508 U.S. 930 (1993) (recognizing aesthetics as a significant government interest justifying a ban on signs directing attention to a building, product, or service not connected to the location of the sign, in the historic district of the city).

Moreover, a content-neutral time, place, and manner restriction is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward*, 491 U.S. at 799 (quoting *United States* v. *Albertini*, 472 U.S. 675, 689 (1985)). While a reasonable time, place, or manner restriction must be narrowly tailored to serve the government's legitimate, content-neutral interests, "it need not be the least restrictive or least intrusive means of doing so." *Ward*, 491 U.S. at 798.

The amendments at issue are narrowly tailored to the Board's interests in preserving the overall appearance and historic significance of the Green because they directly remedy the specific problem the Board sought to address, namely the placement of unattended structures on the Green for extended periods of time. *See Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 792-93 (1984) (ban on signs posted on public utility poles was narrowly tailored to serve the government's interest in aesthetics because the ordinance directly resolved the problem the city sought to address, the particular medium of expression).

The ban on unattended structures in this case is narrowly tailored because it prohibits only a single manner of expression, and does not prevent the Knights from conveying their message either by using their structure for a limited period of time, or through another manner of expression.

Finally, reasonable alternative channels exist through which the Knights can express, and audiences can receive, the Knights' message. R. 88. In assessing whether the amendments provide alternative avenues of communication, the question is not whether a degree of curtailment of speech exists, but rather whether "the remaining communicative avenues are inadequate." *Ward*, 491 U.S. at 802. *See also D.H.L. Associates*, 50 F.3d at 59 (quoting *National Amusements* v. *Town of Dedham*, 43 F.3d 731, 745 (CA1 1995)). Here, the amendments leave open ample alternative channels of expression for the Knights both on and off the Green.

The amended Rules allow the Knights to erect a crèche on the Green, provided the display is in connection with an actual event lasting at most eight hours. Indeed, the Board invited the Knights to apply for such a permit, either for a single event or for a series of events in successive weeks during the Christmas season. R. 87-88. The Knights also can use the Green to convey their message through other manners of expression, all in the same location that the crèche historically has occupied. R. 94, 199.

In addition, the Knights have reasonable alternative locations for the crèche to the extent they insist that it must be displayed for a protracted period of time. There are two churches bordering the Green, at least one of which has offered the use of its property for the display of the crèche. R. 88, 201. The Masons' property also is located directly adjacent to the Green, with a lawn sufficient to display the

crèche in prominent public view. R. 88. The existence of such alternative channels of communication on private property is a relevant consideration. *See, e.g., Plain Dealer Pub. Co.* v. *City of Lakewood*, 794 F.2d 1139, 1147 (CA6 1986) (upholding ban of all news racks in residential areas as reasonable time, place or manner restriction).

CONCLUSION

For the reasons stated, respondents respectfully request that the Court deny the Petition.

Respectfully submitted,

SCOTT P. LEWIS
Counsel of Record
DARYL J. LAPP
JORDANA B. GLASGOW
PALMER & DODGE LLP
Attorneys for Respondents
111 Huntington Avenue
at Prudential Center
Boston, MA 02199
(617) 239-0100